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ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2013-2014

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Huntsville Housing Authority

v.

State of Alabama Licensing Board
for General Contractors et al.

Appeal from Montgomery Circuit Court
(CV-13-900575)

THOMPSON, Presiding Judge.

This appeal arises from the denial of an application by the Huntsville Housing Authority ("HHA") to the State of

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Alabama Licensing Board for General Contractors ("the Board") for a general contractor's license.

On April 3, 2013, HHA filed in the Montgomery Circuit Court ("the trial court") a one-count complaint against the Board seeking to appeal the Board's decision to deny its licensure application, citing § 34-8-27, Ala. Code 1975. Section 34-8-27, which is part of the chapter of the Code addressing licensure of general contractors § 34-8-1 et seq., Ala. Code 1975, provides:

"Any party aggrieved by any decision of the ... Board, either in denying an application for license as a general contractor or in revoking a license, may appeal to the Circuit Court of Montgomery County by filing a bond with the clerk of the court, conditioned to pay all costs of the appeal. Upon notice of the appeal being served upon the ... Board, an issue shall be made up by the court between the appellant and the ... Board, in which the appellant shall allege in what respect the action of the ... Board was erroneous and prejudicial to him or her; whereupon the court shall hear the evidence and, without regard to the decision of the ... Board, shall render such decision as the court is of the opinion the ... Board should have rendered in the first instance."

On the same day that HHA filed its complaint, HHA also filed a cost bond with the trial court.

In its complaint, HHA alleged and asserted, in part:

"5. On or about July 11, 2012, HHA submitted a written application (the 'application') to the Board for a general contractor's license.

"6. On or about July 16, 2012, HHA received a memorandum from the Board (the 'memorandum') with regard to the [general contractor's] examination:

"....

"7. The memorandum also requested that HHA complete some additional forms and provide some additional information. HHA completed the required forms and provided the requested information to the Board within a reasonable time after receiving the memorandum.

"8. In reasonable reliance on the memorandum, HHA paid the required fees for its employee and qualified party, Connie McLaurin ('McLaurin') to register for and take the examination. The Board accepted the fees and allowed McLaurin to complete at least part of the examination.

"9. On January 9, 2013, after McLaurin had already taken part of the examination, Kristi Whynott with the Board contacted McLaurin via telephone, and left a voice message stating that the Executive Secretary of the Board, Joseph Rodgers ('Rodgers'), was denying the application 'based on the definition of general contractor because [HHA] [is] a non-profit organization.'

"10. On February 13, 2013, HHA sent a letter to Rodgers requesting an opportunity to be heard at the February 20, 2013, Board meeting concerning the denial of the application.

"11. At the Board meeting on February 20, 2013, (the 'hearing'), the undersigned [counsel for HHA] appeared before the Board on behalf of HHA to appeal

the denial of the application. The undersigned presented facts and legal argument showing that the application was due to be granted, and answered questions posed by the Board members.

"12. At the hearing, the only argument advanced by the Board members and/or Rodgers in opposition to the granting of the application was that HHA is a public entity, and public entities should not compete with private entities.

". . . .

"14. At the conclusion of the hearing, the Board instructed [counsel for HHA] that it would consider HHA's appeal of the denial of the application, and inform HHA and/or [counsel for HHA] when it reached a decision concerning the same.

"15. On or around March 5, 2013, an assistant for [counsel for HHA] contacted the Board to inquire as to whether a decision had been reached concerning HHA's appeal. Rodgers returned her call and stated, over the telephone, that the Board had denied HHA's application, and that the Board would send HHA something in writing outlining the Board's reasoning for the denial.

"16. On March 25, 2013, because neither HHA nor [counsel for HHA] had received anything in writing from the Board, [counsel for HHA] sent a letter to Rodgers requesting written notice confirming the Board's decision in regard to HHA's application and outlining the reasons for said decision. A true and correct copy of the letter is attached hereto as Exhibit 'A.'

"17. To date, neither HHA nor [counsel for HHA] has received anything in writing from the Board concerning HHA's appeal of the denial of its application for a general contractor's license."

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In its complaint filed in the trial court, HHA asserted that its licensure application met the requirements of all applicable statutes, rules, and regulations, and, therefore, it maintained, it was entitled to a general contractor's license. HHA maintained:

"The Board has not provided HHA with anything in writing outlining the reasons for denying the [a]pplication. Nevertheless, assuming that the Board's reason for denying the [a]pplication was that HHA is a public entity, HHA states that the Board's decision was erroneous and prejudicial to HHA because there is no prohibition against public entities holding [a] general contractor's license in the Alabama Code or the Alabama Administrative Code."

HHA requested that the trial court hear evidence and, without regard to the decision of the Board, render a judgment or decision as the Board should have rendered in the first instance, citing § 34-8-27.

On May 6, 2013, the Board filed a motion to dismiss HHA's complaint for, among other reasons, lack of subject-matter jurisdiction, pursuant to Rule 12(b)(1), Ala. R. Civ. P. In its motion to dismiss, the Board did not reference the Alabama Administrative Procedure Act ("AAPA"), § 41-22-1 et seq., Ala. Code 1975; instead, the Board asserted, among other things, that the complaint should be dismissed because the Board is

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entitled to sovereign immunity. Several days later, on May 8, 2013, HHA filed an amended complaint seeking to add as additional defendants the five members of the Board, solely in their official capacities, and Joseph Rodgers, the Board's executive secretary, solely in his official capacity.¹

Thereafter, all the defendants moved to dismiss, asserting, among other things, that HHA's action should be dismissed for lack of subject-matter jurisdiction because, they maintained, HHA had failed to exhaust its administrative remedies and/or had failed to comply with the appeal provisions of the AAPA.² HHA responded by asserting, among other things, that § 34-8-27, and not the AAPA, provided the statutory basis for appeal of the Board's denial of its licensure application. We note that § 41-22-20, Ala. Code 1975, a part of the AAPA, provides for the appeal of a final

¹HHA also sought to add five additional counts not relevant to the disposition of this appeal. Therefore, we do not discuss those additional counts in detail.

²On June 24, 2013, the trial court held a hearing at which it appears it heard oral arguments on the motions to dismiss filed by the Board and Rodgers, as well as various other motions and responses thereto. On July 15, 2013, the Board members jointly filed a motion to dismiss.

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decision of an administrative agency in a contested case; that statute provides, in part:

"(a) A person who has exhausted all administrative remedies available within the agency, other than rehearing, and who is aggrieved by a final decision in a contested case is entitled to judicial review under th[e AAPA]. ...

"(b) All proceedings for review may be instituted by filing of notice of appeal or review and a cost bond with the agency to cover the reasonable costs of preparing the transcript of the proceeding under review, unless waived by the agency or the court on a showing of substantial hardship. A petition shall be filed either in the Circuit Court of Montgomery County or in the circuit court of the county in which the agency maintains its headquarters

".

(d) The notice of appeal or review shall be filed within 30 days after the receipt of the notice of or other service of the final decision of the agency upon the petitioner or, if a rehearing is requested under Section 41-22-17, [Ala. Code 1975,] within 30 days after the receipt of the notice of or other service of the decision of the agency thereon. ... This section shall apply to judicial review from the final order or action of all agencies, and amends the judicial review statutes relating to all agencies to provide a period of 30 days within which to appeal or to institute judicial review."

On August 1, 2013, the trial court entered an "order of dismissal" that, among other things, dismissed the action for lack of subject-matter jurisdiction, determining, in part:

"[HHA] has filed a complaint and first amended complaint in [the trial court] seeking judicial review of the [Board's] denial of its application for a general contractor's license. Specifically HHA states in its first amended complaint that HHA's attorney appeared at a hearing before the Board in February to appeal the denial of its application for a license. At that time, HHA's attorney presented facts and legal arguments and answered questions posed by the Board members. Subsequently thereto, the Board denied HHA's application. (See first amended complaint at paragraphs 16-19.)

"This court has considered HHA's complaint, first amended complaint, motion for a preliminary injunction and response to motions to dismiss and defendants' motion to dismiss, motion to dismiss first amended complaint, motion to dismiss claim for injunctive relief, and Rodgers's motion to dismiss, as well as held a hearing on June 24, 2013, related to the same. Upon consideration of the foregoing, this court finds that it lacks subject matter jurisdiction over this matter based on HHA's failure to meet the statutorily mandated notice and filing requirements for judicial review set forth under Ala. Code 1975 § 34-8-27 and the Alabama Administrative Procedure Act (the AAPA)."

HHA timely appealed. The dispositive issue on appeal is whether the trial court had subject-matter jurisdiction over this action. We answer that question in the negative; we agree with the trial court's dismissal of this action for lack of subject-matter jurisdiction, albeit for a different reason than the one upon which the trial court based its decision.

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At the outset, we note the applicable standard of review of a trial court's ruling on a motion to dismiss for lack of subject-matter jurisdiction. In Ex parte Alabama Department of Transportation, 978 So. 2d 718, 720 (Ala. 2007), our supreme court stated:

"In Newman v. Savas, 878 So. 2d 1147 (Ala. 2003), this Court set out the standard of review of a ruling on a motion to dismiss for lack of subject-matter jurisdiction:

"A ruling on a motion to dismiss is reviewed without a presumption of correctness. Nance v. Matthews, 622 So. 2d 297, 299 (Ala. 1993). This Court must accept the allegations of the complaint as true. Creola Land Dev., Inc. v. Bentbrooke Housing, L.L.C., 828 So. 2d 285, 288 (Ala. 2002). Furthermore, in reviewing a ruling on a motion to dismiss we will not consider whether the pleader will ultimately prevail but whether the pleader may possibly prevail. Nance, 622 So. 2d at 299.'

""878 So. 2d at 1148-49."

"Pontius v. State Farm Mut. Auto. Ins. Co., 915 So. 2d 557, 563 (Ala. 2005). We construe all doubts regarding the sufficiency of the complaint in favor of the plaintiff. Drummond Co. v. Alabama Dep't of Transp., 937 So. 2d [56] at 58. [(Ala. 2006)]'

"Ex parte Alabama Dep't of Transp., 978 So. 2d 17, 20-21 (Ala. 2007)."

We also note that jurisdictional matters, such as whether a decision is final so as to support an appeal, are of such importance that an appellate court may take notice of them ex mero motu. See Alabama Dep't of Econ. & Cmty. Affairs v. Community Serv. Programs of West Alabama, Inc., 65 So. 3d 396, 402-03 (Ala. Civ. App. 2010) (wherein this court, after noting that appellate courts may consider matters relating to subject-matter jurisdiction ex mero motu, determined that the trial court lacked subject-matter jurisdiction of a judicial-review action purporting to appeal a preliminary, as opposed to a final, decision under the AAPA).

In the present case, on or about March 5, 2013, Rodgers told an assistant of HHA's counsel, via a telephone conversation, that "the Board had denied HHA's [licensure] application, and that the Board would send HHA something in

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writing outlining the Board's reasoning for the denial." On or about March 25, 2013, because neither HHA nor HHA's counsel had received "anything in writing from the Board" regarding the Board's denial of HHA's licensure application, HHA's counsel wrote the Board a letter requesting written confirmation of the Board's decision regarding the denial. On April 3, 2013, HHA filed in the trial court the present action seeking to appeal the Board's decision to deny its licensure application because, as of that date, neither HHA nor HHA's counsel had received any "written notice" regarding the Board's denial of HHA's licensure application.

The AAPA, which was enacted by Ala. Acts 1981, Act No. 81-855, "is intended to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public." § 41-22-2(a), Ala. Code 1975.

Section 41-22-26, Ala. Code 1975, provides, in part: "[I]t is the express intent of the Legislature to replace all provisions in statutes of this state relating to ... agency orders, administrative adjudication, or judicial review

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thereof that are inconsistent with the provisions of th[e AAPA]."

Section 41-22-3, Ala. Code 1975, defines, among other terms, "contested case," "license," and "licensing" as follows:

"(3) Contested case. A proceeding, including but not restricted to ... licensing, in which the legal rights, duties, or privileges of a party are required by law to be determined by an agency after an opportunity for hearing. ...

"(4) License. The whole or part of any agency franchise, permit, certificate, approval, registration, charter, or similar form of permission required by law, but not a license required solely for revenue purposes when issuance of the license is merely a ministerial act.

"(5) Licensing. The agency process respecting the grant [or] denial [] ... of a license"

Sections 41-22-12 through 41-22-18, Ala. Code 1975, set forth the procedures to be utilized in contested cases, and § 41-22-19(a), Ala. Code 1975, provides that "[t]he provisions of [the AAPA] concerning contested cases shall apply to the grant [or] denial ... of a license." Section 41-22-15, Ala. Code 1975, provides, in part: "[I]n a contested case, a majority of the officials of the agency who are to render the final order must be in accord for the decision of the agency

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to be a final decision." Section 41-22-16(a), Ala. Code 1975, requires the final order in a contested case to be in writing, and § 41-22-16(d), Ala. Code 1975, sets forth the procedure for an agency to notify a party of a final decision in a contested case.

"[T]he first rule of statutory construction [is] that where the meaning of the plain language of the statute is clear, it must be construed according to [its] plain language." Ex parte United Serv. Stations, Inc., 628 So. 2d 501, 504 (Ala. 1993). "Principles of statutory construction instruct this Court to interpret the plain language of a statute to mean exactly what it says and to engage in judicial construction only if the language in the statute is ambiguous." Ex parte Pratt, 815 So. 2d 532, 535 (Ala. 2001). Based on the plain language of the AAPA, the Board's licensing process, including its denial of a licensure application, as in the present action, falls within the definition of a "contested case" under the AAPA. § 41-22-3(3) (defining "contested case"); § 41-22-3(5) (defining "licensing"); and § 41-22-19(a) (providing that the provisions of the AAPA concerning contested cases apply to the denial of a license).

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See also Scott v. State Pilotage Comm'n, 699 So. 2d 196, 199 (Ala. Civ. App. 1997) (wherein this court, after quoting a portion of the definition of "contested case" under § 41-22-3(3), noted that "the denial of a license is considered a contested case").

Section 41-22-25, Ala. Code 1975, provides:

"(a) Th[e AAPA] shall be construed broadly to effectuate its purposes. Except as expressly provided otherwise by th[e AAPA] or by another statute referring to th[e AAPA] by name, the rights created and the requirements imposed by th[e AAPA] shall be in addition to those created or imposed by every other statute in existence on the date of the passage of th[e AAPA] or thereafter enacted. If any other statute in existence on the date of the passage of th[e AAPA] or thereafter enacted diminishes any right conferred upon a person by th[e AAPA] or diminishes any requirement imposed upon an agency by th[e AAPA], th[e AAPA] shall take precedence unless the other statute expressly provides that it shall take precedence over all or some specified portion of th[e AAPA].

"(b) Except as to proceedings in process on October 1, 1982, th[e AAPA] shall be construed to apply to all covered agency proceedings and all agency action not expressly exempted by th[e AAPA] or by another statute specifically referring to th[e AAPA] by name."

In the present action, none of the conditions in § 41-22-25(a) apply, so the AAPA governs. Section 41-22-20 provides for the

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appeal of a final decision in a contested case. Section 41-22-16 requires the final decision to be in writing.

In the present case, it is undisputed that the Board never entered a final decision within the meaning of the AAPA regarding its denial of HHA's licensure application. Rodgers's statement to the assistant to HHA's counsel during the March 2013 telephone conversation appears, at best, to be a courtesy or a preliminary notice of denial, informing HHA to expect a final written decision of the Board regarding the denial; no such final written decision appears to have been rendered. Therefore, because there is no final decision within the meaning of the AAPA in the present case, there is nothing for HHA to appeal from to invest the trial court with subject-matter jurisdiction. See Alabama Dep't of Econ. & Cmty. Affairs v. Community Serv. Programs of West Alabama, Inc., supra.³ Parties cannot by consent or waiver confer subject-matter jurisdiction. Reynolds v. Colonial Bank, 874 So. 2d 497, 505 (Ala. 2003) (citing Wilkinson v. Henry, 221

³We note that § 41-22-20(f), Ala. Code 1975, provides that "[u]nreasonable delay on the part of an agency in reaching a final decision shall be justification for any person whose rights, duties, or privileges are adversely affected by such delay to seek a court order compelling action by the agency."

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Ala. 254, 256, 128 So. 362, 364 (1930)). Accordingly, the trial court lacked subject-matter jurisdiction of the action.

Because the trial court lacked subject-matter jurisdiction of the original complaint filed in this action, it also lacked subject-matter jurisdiction of any purported amended complaint. See Off Campus Coll. Bookstore, Inc. v. University of Alabama in Huntsville, 25 So. 3d 423 (Ala. 2009); Alabama Dep't of Pub. Safety v. Ogles, 14 So. 3d 121 (Ala. 2009); Alabama Dep't of Corr. v. Montgomery Cnty. Comm'n, 11 So. 3d 189 (Ala. 2008); and Ex parte Alabama Dep't of Transp., 6 So. 3d 1126 (Ala. 2008). Because the trial court does not have and never had subject-matter jurisdiction over this action, we uphold the trial court's dismissal of the action.

As indicated above, however, our review of the record convinces us that HHA's appeal to the trial court is due to be dismissed for lack of subject-matter jurisdiction on the basis that the Board has not yet entered a final decision. We therefore instruct the trial court to enter an amended order

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of dismissal, consistent with this opinion, so that a final decision may be rendered by the Board.⁴

APPEAL DISMISSED WITH INSTRUCTIONS.

Pittman, Thomas, Moore, and Donaldson, JJ., concur.

⁴In doing so, we decline to express an opinion regarding the relative substantive merits of the positions assumed by HHA and the Board during their dispute.